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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

Nos. 281–282

IN THE MATTER OF GRANADA APARTMENTS, INC., DEBTOR.

WEIGHSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,
Respondents.

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

We submit that the petition should be denied. Commencing at Record 769 and continuing to page 791 are 58 findings of fact made by the trial court, some materially adverse to these respondents and others not. Our exceptions were taken and noted (R. 793). Prior thereto we had assigned in writing our objections to the findings submitted by the Court Trustee (R. 722). We then appealed to the United States Circuit Court of Appeals from those findings which were materially adverse

and from the portions of the decree which were adverse. The whole record was certified up along with our comprehensive statement of points relied upon and our assignment of errors (R. 799 and 817).

The United States Circuit Court of Appeals reversed the findings complained of and reversed those portions of the decree complained of.

Assuming that reasons for review exist, which we hereafter deny, the Court Trustee is now here seeking certiorari to reverse the action of the Court of Appeals with full burden of demonstrating that the findings so reversed were not clearly erroneous; for if they were, the United States Circuit Court of Appeals was entitled to disregard them and to set them aside under Federal Rules of Civil Procedure, Rule 52.

An examination of his petition, however, discloses no reference to the evidence, with some three or four exceptions. He seems to be of the opinion that the findings of the trial court must stand in any event and that it is quite unnecessary even under the circumstances of this case that he show how they are supported.

The evidence in this record is in the form of a narrative statement but the parties were given leave to refer to the original transcript of evidence should they care to do so (R. 921). That original transcript of evidence is on file with the Clerk of this Court although the petitioner has refrained from having it printed. The trial court's oral opinion was transcribed and is of record, page 761. Reference thereto will disclose the extent to which the findings which the Court Trustee was directed to and did prepare depart from any which were made by the trial court in its opinion.

If those findings are true, the Court's decree should have been affirmed and not reversed.

On our appeal to the United States Circuit Court of Appeals we took the burden of showing that they were not true. The Court Trustee has made no attempt here to satisfy his burden of showing that the findings were not clearly erroneous, and if we were to assume again the burden of showing that the findings were either wholly unsupported by the evidence or were clearly erroneous there would be no meaning to burden of proof.

Specifically, other reasons for denial of the petition are as follows:

I.

At pages 52-55 of his petition the Court Trustee lists the reasons which he relies upon for issuance of the writ. None is sufficient unless it be the one contained in paragraphs l, m, n, o and q, all of which really relate to the same point.

The Court Trustee's motion to dismiss our appeal taken as of right was predicated on the proposition that the appeal involved only the question of fee allowances, and that since the decision in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, such appeals may be taken only by leave; and also on the further proposition that even if questions other than fee allowances were involved so that an appeal by right was necessary, it was not perfected within the time or in the manner provided by the law and the rules then in effect.

The Court Trustee's motion to dismiss Appeal 6986 (the appeal by leave) is based on the proposition that the rules of the United States Circuit Court of Appeals then in effect did not prescribe the mode or method of taking an appeal by leave but that such appeal was governed by the Federal Rules of Civil Procedure, and that the appeal was not perfected within the time or manner provided by the latter rules.

Both appeals were taken by us from the decree entered May 2, 1939, and from the findings of fact which by reference had been incorporated into that decree. The decree disposed of issues which arose on the final report and account of City National Bank and Trust Company of Chicago, as Indenture Trustee, on the claim of City National Bank and Trust Company of Chicago in its own behalf, on the petitions for fees and expenses of administration filed by the Committee and its counsel, the objections of the Court Trustee to all of the foregoing and upon the counterclaim of the Court Trustee seeking to surcharge the Indenture Trustee with substantial sums for alleged wrongful acts and omissions in the management and operation of the mortgaged premises.

It is thus apparent that while the question of fee allowances is involved in the appeal, there are many more vital questions involved which have nothing to do with fee allowances. As the question of fee allowances and expenses could be raised only by an appeal by leave and as all of the other matters from which the appeal was sought could be raised only by appeal by right, it was necessary to take an appeal by right and also an appeal by leave.

The fact that the appeal by leave raises other questions in addition to those involving fee allowances was not at the time grounds for dismissal of that appeal, nor was the fact that the appeal by right included the question of fee allowances ground for its dismissal, since there were questions left for review which could only be reviewed by appeal taken in that manner. There is, therefore, no basis for the contention that by appealing by one method we were estopped to appeal by the other.

As to the appeal by right, we admit that it is governed by the Federal Rules of Civil Procedure, particularly Rules 73 and 75.

We filed our notice of appeal on June 1, 1939 (R. 796) or within thirty days of the date of the entry of the decree appealed from. Accordingly under Rule 73(g) we were required within forty days of June 1, 1939 to file the record in the United States Circuit Court of Appeals unless the District Court granted further time on motion made within the forty-day period.

The claim of the Court Trustee is that the record not having been filed until August 19, 1939, which was more than forty days after the filing of the notice of appeal, there was no compliance with the rule and accordingly the appeal was not perfected.

As the Court Trustee well knows, on July 7, 1939 the District Court did extend the time. The order does not appear in the printed transcript here but it is admitted by the Court Trustee. At Record 1007, in his motion to dismiss, he said, "On July 7, 1939 appellant secured an order in the District Court extending time until August 19, 1939 for docketing said case on appeal; and within said time did so docket said appeal in said Court of Appeals as Case No. 7060." See also original transcript of record from the Clerk of the District Court, pages 477 and 478, at which the order of the District Court appears.

It is thus manifest that the record on the appeal by right was filed strictly in accordance with the Federal Rules of Civil Procedure.

While it is true that the Federal Rules of Civil Procedure superseded all rules of the Circuit Court of Appeals which were conflicting, the fact remains that the Federal Rules of Civil Procedure relate only to appeals by right and are entirely silent as to appeals to be taken by leave. An examination of Rule 73 confirms this assertion.

It follows that the procedure on appeals by leave was controlled by the rules of the United States Circuit Court

of Appeals for the Seventh Circuit in effect at the time the appeal by leave was taken and allowed. The rules remained in effect until November 10, 1939, when the present rules of the United States Circuit Court of Appeals for the Seventh Circuit became effective.

What then were those rules and what did they provide? Rule 13, Section 1, provid d among other things that the transcript should be filed with the Clerk of the Court of Appeals on or before the return day specified in the citation unless the time was enlarged by a judge of the District Court or by the Court of Appeals or some judge thereof. Section 3 of Rule 13 provided that the citation must be returnable within thirty days from the date on which the appeal was allowed, which it was in this case (R. 834). On June 12, 1939 we petitioned the Court of Appeals for leave to appeal. On June 22, 1939 leave was allowed and citation issued returnable July 22, 1939. Accordingly, the record was due in the Court of Appeals on July 22, 1939, but on July 19, 1939, a short record having been filed, we made a motion in the Court of Appeals to enlarge the time for the filing of the full record, which was allowed on July 21, 1939 and the time extended to September 16, 1939 (R. 873). On August 19, 1939 we filed a full record in appeal 7060, the one taken by right. That having been done, on September 8, 1939, within the time as enlarged, we moved in each case that the two appeals be consolidated and that the record filed in the appeal by right, together with the short record filed in the appeal by leave, stand as the record (R. 876). The motion was granted (R. 919).

Even if by any possibility the Federal Rules of Civil Procedure rather than the then existing rules of the Court of Appeals controlled appeals taken by leave, the Court Trustee's contention that that appeal should be dismissed because the record was not filed within the time fixed by the Federal Rules of Civil Procedure would be

without merit; for it is a familiar rule to this Court that if the appellants failed to file their record on time, the appellee could have had the cause docketed and dismissed. If, however, the appellant files his record late but before the appellee has moved for dismissal there is no penalty. The present Rule 11 of the Court of Appeals as adjusted to conform to the Federal Rules of Civil Procedure is substantially to the same effect.

We submit that this is a complete answer to Court Trustee's reasons (l), (m), (n) and (o) and, the facts being as they are, a complete answer to reason (q).

The Court of Appeals for the Seventh Circuit has held that appeals from fee allowances are by leave. This Court has affirmed its decision in that case (*Dickinson Industrial Site, Inc.*, v. *Cowan*, 60 S. Ct. 595). The ruling of the Sixth Circuit in the matter of *Butzel* v. *Webster Apartments Building*, 112 F. (2nd) 362, is not at all in conflict for it does not hold that the Court of Appeals can review fee allowances as a matter of right but merely that those courts may, under the Bankruptcy Act, review and readjust fee awards made by the state courts.

Then too the Court Trustee complains that there were "surprise issues" and that the Court of Appeals did not adhere to the record issues. We again refer the court to our statement of points (R. 799) and we submit *that no matter of consequence was omitted therefrom* or from the issues presented by our appeals.

Nor did the Court of Appeals set aside findings in omnibus fashion. An examination of its opinion shows that it is only those material findings which related to allowances to the Court Trustee and to alleged wrongdoing of the Indenture Trustee, Committee and counsel which were set aside.

From the foregoing it appears that no reason of which

this Court will take cognizance exists for the granting of the petition.

II.

The Court Trustee uses the names of City National Bank and Trust Company of Chicago, of Central Republic Trust Company, of the Committee members and of their counsel interchangeably. In mentioning the sums alleged to have been wrongfully disbursed or retained he does not specify who made the disbursements or who retained the funds but charges generally that City National Bank and Trust Company of Chicago is liable. Central Republic Trust Company went into receivership November 20, 1934, and as far back as June of 1932 was heavily indebted to the Reconstruction Finance Corporation to which it had pledged all of its assets. City National Bank and Trust Company of Chicago, a National banking association, separately organized under the laws of the United States, took over its deposit liabilities but none other. By order of the state court the latter bank became Successor Trustee of this Trust January 3, 1935 after the resignation of Central Republic Trust Company had been accepted by the state court. Nor was the Committee controlled by either bank. There were five members and three of them had no connection whatsoever with either bank (R. 422).

Now there was nothing in the Trust Indenture which purported to create any lien on furniture or to make it any part of the real estate, nor does it appear that in the loan agreement or otherwise the borrowing corporation undertook to give a first lien on the chattels (R. 505).

And we deny the Court Trustee's implication that provision was made for the payment of the Pick claim out of the proceeds of the refunding loan. Indeed, the record affirmatively shows that no provision was made in the loan account for the payment of the Pick items (R. 499).

Assuming, therefore, that there had been any misrepresentation to bondholders in 1924, the time of the original loan, or in 1928, the time of the refunding loan, the remedy of the bondholders would have been an action not against the Trustee to compel it to obtain all of the Trust Estate which was to have been delivered to it—for it already had all of the Trust Estate—but an action against the underwriters for misrepresentation. Such an action is personal to the bondholders and would lie against the Cody Trust Company or Chicago Trust Company, according to which underwriter sold the bonds. Among the conditions precedent to recovery would be that the purchaser show that the misrepresentations related to a material matter; that he show the circular which contained it and that he relied upon it in purchasing his bond.

Having in mind that City National Bank and Trust Company of Chicago did not become Successor Trustee until January of 1935, what possible connection with or responsibility for the underwriting could it have unless it took over the liabilities of the underwriter, which it did not. As a matter of fact, there is not a word in the record showing that during or prior to the year 1935 City National Bank and Trust Company of Chicago knew anything about the circular or its contents. But even if it did, no duty or liability would have been thereby imposed upon it.

Immediately upon its appointment it secured from the Receiver or its predecessor in trust all of the trust estate, consisting of land, building and all furniture, furnishings and equipment therein on which at that time there *was* a chattel mortgage as additional security (R. 509). Later when the account filed by the Receiver on behalf of Central Republic Trust Company was approved by the state court, City National obtained all of the funds in the Trust, amounting to $9995.46 (R. 114).

So that the Successor Trustee fully performed all of its

duties and obligations and it continued to do so until the property was turned over to the Federal Court.

It is suggested by the Court Trustee on some undisclosed theory that City National Bank and Trust Company in January of 1935 or thereafter should have proceeded against the underwriter. By virtue of what power or right? Does he mean that the Successor Trustee under a trust deed in the absence of an express power therein contained acquires the right to sue the underwriter on account of misrepresentation, if any, to the purchaser of the bonds, and, if so, what would be the nature of the action and for whose use and benefit? Would it be for all the bondholders or for only those who saw the circular and relied upon it, and just who were they? How much would the judgment be and, again, for whose use and benefit? What would be the likelihood of successfully prosecuting such action, the Illinois Statute of Limitations, of which the court will take jurisdictional notice, being for five years, commencing September of 1928, the date of the sale of the bonds? And, again, what prospect of recovery against underwriters in receivership on any judgment obtained, to justify the expense of the proceeding?

We see no sense to the Court Trustee's contentions in this regard.

The Court Trustee sets up various appendices which are not in the record. Appendices A, B and C were presented by him to the Court of Appeals after the oral argument "for its convenience." He follows more of the same tactics at the conclusion of his brief where he argues that since some committees and trust companies have been derelict in their duties, that the Committee and Trustee of the Granada must have been.

Until the enactment of Section 77-B it was nothing unusual for foreclosure proceedings to pend for years with-

out conclusion. The story in this case was told by the witness Johnson (R. 421). His testimony shows that everything possible to do was done to get the matter out of court.

When the case was properly brought in 77-B by petitions approved May 17, 1937 (R. 2), the Committee lost no time in procuring confirmation of a plan. The plan was confirmed July 12, 1937 (R. 101) and notwithstanding the intervention of the summer vacation the property went over to the new company on October 22, 1937.

III.

At page 26 of his petition the Court Trustee complains of the decree of sale entered by the state court in the foreclosure proceeding for two reasons—first, that it does not find that the moneys are due the complainant from Granada Apartments, Inc., the debtor, but rather finds that they are due from Granada Hotel Corporation, its predecessor and the mortgagor; second, that the state court did not approve the account of the Indenture Trustee relating to funds collected by it while mortgagee in possession.

As to his first contention, it is sufficient to say that a decree of foreclosure and sale is one *in rem*. The primary purpose is to state the account as between the parties, to find the lien of the mortgage upon the property as security for the amounts found due and to order a sale of the property. And this is so whether the mortgagor corporation is or is not defunct.

Then after the sale, arises the question of deficiency and personal liability therefor. As far as Granada Apartments, Inc., is concerned, there could be no deficiency against it nor any personal liability unless it was shown that it had

assumed and agreed to pay the indebtedness, and there is no proof of that fact in this record.

As to the Court Trustee's second contention, it is true that the Chancellor did not approve the account of the Indenture Trustee in the sense that he might approve the account of a court officer.

At the time of the entry of the decree there was considerable question in the minds of some of the Chancellors as to whether or not mortgagees in possession having foreclosure suits pending in their courts should not be compelled to account directly to the court just as a receiver would have to do. It was finally decided that they should not. But that does not mean that the mortgagee in possession in the general accounting action between the parties does not have to give credit for the net rents realized, nor did it in any way change the practice which required the defendants to raise such points as they might have by way of objections to the account, and none having been raised, the general accounting as between the parties was approved—as the decree shows.

Since these matters were never incorporated into the rules of the local courts, it is not possible for us to state predecents. However, both Granada Hotel Corporation and Granada Apartments, Inc., were parties defendant to the foreclosure case and are bound by that decree by all prior orders entered by the court.

It is true, as stated by the Court Trustee at page 26, that fees equivalent to 4% of the gross income were retained by the Trustee banks for the period of their operation. The Trust Deed authorized the retention of reasonable management fees of the Trustee and its agent (R. 505). There is not a word of evidence that 4% was unreasonable and it is well within the allowances made to the Court Trustee in this proceeding with full reservation

to allow him additional fees on account of collateral litigation, including this litigation.

Nor did we stand on the allowances of attorneys' fees made by the state court in the foreclosure proceedings. We pointed out to the District Court that we were willing that it fix the reasonableness of the charge for services rendered by us in the state court proceedings on behalf of the Indenture Trustee, notwithstanding any existing limitations upon the Federal Court's right to review such allowances.

At the bottom of page 28 of his petition the Court Trustee says that it is plain that the Court of Appeals relied on the state court decree in reversing items 3, 4, 5 and 6 which are contained in Record 789.

Taking these items in order:

Item 3, amounting to $1,990.86 (R. 789), is made up of a number of relatively small sums which the Trustee held, not for the benefit of the owner or the mortgagor, but for the use of particular beneficiaries. Space does not permit discussion in detail, but we refer the court to the testimony of Toon at Record 329-332, which shows that these funds were earmarked in most instances for the government on account of taxes or for coupon holders who had not yet presented their coupons, although the funds to pay them were on deposit. The appointment of Mr. Woods as Court Trustee did not make him Indenture Trustee. Any items which the Indenture Trustee held belonging to third persons it had to continue to hold until it was in some manner relieved of the trusteeship.

Moreover, in the $1,990.86 item the court has included the item of $1,608.56 above mentioned, as will clearly appear from Toon's testimony. And it then double charges and includes the same amount in Item 6 at Record 789. This item of $1,608.56 represented a balance in the

account of the trustee in possession at the time of the entry of the decree of sale in the state court foreclosure proceedings more than four months before the bankruptcy. In that proceeding, as above narrated, the Trustee sought the statement of an account of the amounts due if from Granada Apartments, Inc., after allowing all just credits, deductions, and set-offs. The Trustee, after showing what was due it on account of bonds, coupons, and other indebtedness, showed the balance of $1,608.56 in its possession on account of rents collected, and this balance was by the decree credited against the indebtedness found due the Trustee (R. 511). In this situation it must be perfectly plain that the item did not belong to the debtor estate. We again refer to Toon's testimony (R. 329-332).

As to Item 4 (R. 789), "Without authority City National consented to and made wrongful payment from rentals upon Receiver's certificate, $7500, and also caused payments to Pick's successor August, 1933, $13,000"—

The idea is to charge City National Bank and Trust Company of Chicago with these amounts. When the item of $13,000 was disbursed in August of 1933, City National Bank and Trust Company of Chicago was not the Trustee and had nothing to do with the matter. It became Trustee January 4, 1935. Nor did its predecessor in trust disburse the $13,000. That item was paid under court order by Chicago Title and Trust Company, the then Receiver in the state court foreclosure, under these circumstances: After the litigation in respect of the fixture items had gone all the way to the Illinois Supreme Court where the title of the chattel mortgagee was upheld, the court having determined the items not to be fixtures, International and Industrial Securities Company, successor to Albert Pick & Company, was about to remove this property from the hotel premises. The property then had a value of at least

the amount set forth in the appraisal (R. 640). In addition, Albert Pick & Company had a claim against the Receiver for the use of the property pending litigation, and that claim was substantial. It also had a judgment against Granada Hotel Corporation for a substantial deficiency after the chattel mortgage sale, and that judgment was a lien which would prove embarrassing in the event of state court reorganization. If the settlement was not made and if the equipment was removed it would have been necessary to replace it new, for it had been specially designed, built, and installed for the apartments in the Granada. While it is true that on the law question presented in the fixture litigation the upper court held that the property could be removed without material injury to the premises, this was true only in the sense in which that expression is used in fixture law. There would have been plenty of injury and confusion with consequent loss of tenants. It was not at all like replacing loose furniture. This was built-in equipment. Pick's successor was willing to sell the equipment and to release its deficiency decree and its claim for rent on payment of $22,500. All of these facts were presented to the chancellor by way of petition (R. 608) and all of the parties in interest, including Granada Apartments, Inc., stipulated to the settlement. The chancellor was fully familiar with the situation; for the fixture trial had lasted for a month and he had personally visited the premises to make an inspection.

The money was to be provided, to the extent of $11,000 out of funds in the possession of the Receiver, and to the extent of $11,500 by moneys to be borrowed on Receiver's certificate. The $11,000 to be paid out of funds in the possession of the Receiver is part of the item of $13,000 set forth in the finding. The remaining $2,000 of that item

represents attorney's fees paid to counsel for the Indenture Trustee on account of services in the fixture litigation, as above related. The court will note that this $2,000 has already been included in Item 6 (R. 789), thus charging twice the same item. This goes to show how inaccurately the matter was considered. The Trial Court simply made the findings as presented by the Court Trustee without any consideration of the written objections filed.

But going back to the settlement of $22,500, the chancellor knew what the property was worth and that the amount paid in settlement was fair.

The Court Trustee will contend that the court was not advised that Indemnity Insurance Company of North America was to lend the money.

This was quite immaterial. Naturally, in August of 1933 nobody could be found to lend $11,500 on a Receiver's certificate excepting someone who had a special advantage to gain by doing so. In this case that someone was Indemnity Insurance Company of North America, and its motive for lending the money was to be released on the suggestion of damages then pending against it in federal court injunction proceedings in which it had executed bonds in favor of Albert Pick & Co. If that suggestion of damages had been pressed to conclusion, the amounts realized would not have belonged to the Granada estate. The proceeds would have been the property of Albert Pick & Co. or its successor. Ownership by Pick's successor of the fixture items was an entirely separate matter which remained to be disposed of regardless of the outcome of the motion on the suggestion of damages. Pick's successor was willing to drop the suggestion of damages of the above settlement on the fixture items could be effected, and it did so when the settlement was consummated.

So as to the $13,000 item City National Bank and Trust company had nothing whatsoever to do with the trusteeship or with the disbursement or with the transaction, and yet it is found to be liable.

Central Republic Trust Company, which was Trustee in August of 1933, did assent to the settlement, for it no doubt realized, as everyone else must, that the premises, built to be operated as a furnished kitchenette apartment hotel, could not be operated and kept revenue-producing unless they were furnished.

But the Circuit Court of Appeals for the Seventh Circuit passed upon this question in the matter of Granada Apartments, Inc., Debtor, appeal of Indemnity Insurance Company of North America, 104 F. (2nd) 528, and this Court refused to grant certiorari. The Petition for rehearing filed in this Court by the Courst Trustee in that case acknowledges that the decision is controlling in this case.

"As to management fees of $11,364.42"—This is item 5 (R. 789) and the finding is that City National charged and retained this amount for its fees for managing the property while trustee in possession. At the outset we again call attention to the Court Trustee's failure to distinguish between Central Republic Trust Company and City National Bank and Trust Company. That failure is again manifested here. The facts are, Central Republic Trust Company, as Trustee in possession, retained for the period of its operation, March 22, 1934 to January 4, 1935, $2,612.23, of which it paid an agent Hall $404.84. The amount represented 4% of the gross income.

City National Bank and Trust Company for the period of its operation as Trustee, January 4, 1935, to May 1, 1937, retained $8,325.15, or 4% of the gross income, of

which it paid its agent Hall $1,472.57. Of the amount retained all but $2,135.55 was for management prior to October 1, 1936. There remains due the Trustee for the period from May 1, 1937 to May 17, 1937, $188.15, which has never been paid.

The total amount of management fees to both Trustees, inclusive of the $188.15 and of the payments to Hall, is therefore $11,025.53, and not $11,365.42 as claimed.

The over-all charge, including the agent's, equalled 4% of the gross collection for the periods in question. This was a reasonable and customary charge (R. 417) and well within the rate recommended by the Chicago Real Estate Board and well within allowances many times approved in the District Court for similar services in like cases. Attorneys' fees incident to receivership management were eliminated through trustee possession.

The trust deed contained express authority for the retention of reasonable management fees of the Trustee and its agents (R. 505).

Central Republic Trust Company accounted for the sum so retained by it to the Superior Court, and its account was approved February 11, 1935 (R. 621).

City National accounted for all funds collected and disbursed by it through September 30, 1936, including the sum of $6,189.60 for management fees prior to October 1, 1936, and the state court decree of December 18, 1936 (R. 511) is binding on the Trustee in Bankruptcy, as is said order approving the account of Central Republic Trust Company.

The rate of compensation to the Court Trustee for his services in operating the same property for a period extending from May 17, 1937 to about November 20, 1937 was $7,500, as fixed and allowed by the District Court.

No reason is assigned and no showing is made why these fees should not have been retained by the Indenture Trustees. It is simply asserted that they were retained "without authority."

"As to the fees of the master in chancery $2,552.80" —These fees are included in Item No. 6 (R. 789). City National Bank and Trust Company of Chicago, as Successor Trustee, had gone to reference and hearing in the State Court—*this after Judge Lindley in the old bankruptcy proceedings had refused to restrain the foreclosure suit and had pointed out the advantages of going to decree* (R. 215). The Master's report was published and filed. His fees were fixed and allowed by the court and taxed as costs (R. 515). City National paid the costs so incurred out of trust funds in its possession, the action having been brought by it for the benefit of all bondholders. The voucher supporting this payment is in evidence. On these facts what possible basis is there for the surcharge of this item?

"As to the payment of $2,000 to counsel for the indenture trustee on account of services in the fixture litigation"—This amount also is included in the figure at Item 6 (R. 789), at which point City National is surcharged with precisely the same sum.

The payment was made by Chicago Title and Trust Company, Receiver, under court order of March 16, 1934, eight months before City National Bank and Trust Company ever became Successor Trustee. The payment was on account of legal services rendered the Trustee in the Trial Court, in the Appellate Court of Illinois, and in the Supreme Court of Illinois in seeking to establish that the carpet, ozite, in-a-door beds, kitchen and china cases were part of the real estate and thus part of the mortgage security. Counsel rendered further services in assisting

in the settlement with Pick, made after the litigation failed of its purpose, on order of court.

The charge was nominal in respect of the work obviously required. Its reasonableness was determined by the state court by order entered August 11, 1933 (R. 614).

In this situation on what possible theory could the account of City National Bank and Trust Company of Chicago be surcharged with this sum of $2,000?

"As to the fees and expenses of $4,025.29 incurred and paid in connection with the old 77B proceedings"—This sum too is included in Item 6 at Record 789. $3,500 of the amount is for fees paid to counsel for the Indenture Trustee and the Committee for services in connection with the old Granada bankruptcy proceeding ultimately determined by this Court to be invalid in the case of *Tuttle* v. *Harris,* 56 S. Ct. 416. The balance was for expenses and costs incurred in said proceedings.

We have stated the position of the Committee and the Indenture Trustee in respect of these proceedings. The action of the Committee and the Indenture Trustee was therefore justified and they were entitled to be reimbursed for the reasonable fees of their counsel. The services of counsel related to work in the District Court, the Court of Appeals, and this Court, briefs having been filed and oral arguments having been made in each of the three courts.

We submit that the charge was reasonable in respect of the amount and character of the services required, that there is no evidence whatsoever of record to show that the charge is in any way unreasonable, and accordingly the Trial Court's surcharge in this amount may not be sustained.

As to the sum of $1,608.56 which makes up the balance

of Item 6 (R. 789), as above noted, it was credited against the decree indebtedness in the general accounting between the parties.

The total amount involved in Item 6 at Record 789 is $10,186.65. We submit that on the record there was just no basis on which the Court could find this amount due from City National Bank and Trust Company. As a matter of fact, the Court did not purport to do so in its oral opinion but later of course adopted the Court Trustee's findings as presented.

Conclusion.

Summarizing, in conclusion, we state that the Court Trustee has failed to sustain the burden which he has to show that the material findings were not, as found by the Court of Appeals, clearly erroneous; that rather he is merely reiterating the findings or his own pleadings but not any supporting evidence; that in the few instances in which he has referred to the record we have taken pains to show that the opinion of the Court of Appeals should be sustained; and that the case of *Butzel* v. *Webster Apartment Building*, 112 F. (2nd) 362, has nothing to do with the matter and that the Court Trustee's motion to dismiss having been properly overruled, there are therefore no grounds on which this Court will entertain a petition for certiorari.

We have shown not only that the actions of City National Bank and Trust Company of Chicago since the time of its appointment as Successor Trustee in January of 1935, were justified but that the alleged fraud on which the Court Trustee relies did not in fact exist and finally that the foreclosure decree of sale is quite valid and binding on the Debtor, and on Granada

Apartments, Inc., and that although the accounting of the Trustee was not approved as that of a court officer, nevertheless the accounting as between the parties was approved and is binding.

In short, without any showing on our part it affirmatively appears from the Court Trustee's petition that here again as in the Circuit Court of Appeals and as mentioned in the opinion of that Court, he has no desire to attempt to support the hand-tailored fact findings which he prepared ostensibly pursuant to the direction of the Trial Court given in its oral opinion. Rather, he merely reiterates those findings, together with his pleadings, which he thinks, coupled with vituperative comment against the Bank, Committee and counsel, will lead the Court to grant the writ. Should the Court care to do so on the basis of the petition filed we shall reply to those charges. We do not find it necessary to do so at this time.

VINCENT O'BRIEN,
JOHN MERRILL BAKER,
TRACY WILSON BUCKINGHAM,
Counsel for Respondents.

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